No. 10415

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES T. TAKAHASHI and EDWARD Y. OSAWA,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANTS' REPLY BRIEF

SAMUEL B. BASSETT,
Attorney for Appellant, Charles T. Takahashi,
811 Alaska Building, Seattle 4, Washington.

TRACY E. GRIFFIN,
Attorney for Appellant, Edward Y. Osawa,
1107 American Bldg., Seattle 4, Washington.

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RE-STATEMENT OF THE FACTS

In their opening brief appellants stated facts sufficiently full and clear to present their case to this court satisfactorily, and respondent challenges it in no respect whatever.

Respondent has now filed its brief and the facts therein stated are equally accurate, and appellants have no objection to the veracity thereof. But respondent has muddied the waters. It has interpolated a vast number of quotations from the record (true enough in themselves) in an attempt to show the conspiracy charged in the indictment. These items begin before the conspiracy could possibly have come into existence

and continue until long after it ended, and are added together indiscriminately to matters occurring in the meantime, and if left to this court to decipher would cause Your Honors much needless work. Therefore, in order to save the court a needless waste of time we have concluded to re-state the case, *confining ourselves now entirely to the two briefs for our authority*, if any.

Appellants are importers and exporters, and have been for many years past, their place of business being located at Seattle. They did a considerable business with Japan. Previous to 1940 they had shipped to that country more than forty of these tanks. Their customer in Tokyo was Mikuni-Shoko Company.

Then in 1940 they received from Mikuni-Shoko Company an order for eleven new tanks. They were unable at the time to place this order in full, but contracted for the building of three of them.

This all happened before the war began with Japan, but things were getting taut between the two countries and the United States began to "crack down" by degrees.

The first move made was to give public notice to all concerned that within ten days from date of the notice those interested must have all their contracts fulfilled and their goods shipped out of the country; that after such date further shipments could be made only by special permission from the State Department.

Realizing that they could not get completion of the tanks within the ten days, Takahashi sent his manager Osawa, with his lawyer, to Washington to arrange for such delayed shipment. An application to

ship the tanks later on was made and took its usual course through the State Department, where it was turned down, and the two men returned to Seattle.

After canvassing the situation thoroughly Takahashi determined that it was useless to try to do further business in Japan until the war clouds drifted by. Accordingly, Osawa was sent to Tokyo to adjust the tank situation with Mikuni-Shoko Company and close the Tokyo office. At this time $71,700.00 had been paid upon the uncompleted tanks, with moneys advanced by Mikuni-Shoko. After getting this situation adjusted and the Tokyo office closed, Osawa was destined to go to Shanghai, and there make some arrangement with some concern whereby Takahashi could import wood oil from China to the United States.

Arrived in Tokyo, he adjusted the business with Mikuni-Shoko Company by repaying to them the amount they had advanced, $71,700, and taking title to the tanks.

His contemplated trip to Shanghai was nipped in the bud, however, because the Japanese government which controlled that port refused him permission for the trip.

But he did the next best thing possible to one in his circumstances. He appealed to the old customer Mikuni-Shoko Company to use their good offices to make the connection for him.

They obliged, and furnished Takahashi & Co. with the name of Hua Hsin & Co. as such representative.

In the meantime, Takahashi, having been advised of the settlement made and that he was now the owner

of the tanks, began to put forth efforts to sell them around home.

While this effort was being made he received an order for the three tanks from Hua Hsin Co., the new representative in Shanghai. As a part of this order Hua Hsin Co. blandly directed him to "deduct U. S. $71,700 from our (Hua Hsin Co.) credit account." This was exactly the amount of the old credit with Mikuni-Shoko Company which was wiped out in the settlement with them.

Telephonic communication with Osawa, still in Tokyo, resulted in Takahashi being informed by Osawa that when the matter was called to their attention, Mikuni-Shoko Company had promised him (Osawa) "to get him a new contract."

In spite of this assurance Takahashi put little faith in the order, but, nevertheless, a new application to ship the tanks to Hua Hsin Co. at Shanghai was filed by Takahashi, to have in readiness for immediate delivery in case payment therefor came through.

In the meantime he continued his efforts to sell the tanks here, and no payment coming through from China he finally sold them in this country, and the matter was closed.

That was and is our case, and upon that basis we made a motion to take the case from the jury, which was denied, and becomes one of our assignments of error in this court.

Respondent then makes its showing. It says:

"The appellants were charged with conspiracy

(a) To violate Section 6 of the Presidential

order by filing the application in Washington in that the application should have shown the name of the consignee and the true country of ultimate destination.

(b) Filing the order.

(c) Making false statements in the order."

Respondent then devotes many pages to a recitation of facts contained in the record, and which it claims sums up to this:

> "In the present case, we have the appellants phoning one another, sending telegrams, writing. We have three tanks purchased for the Japanese Government—delivery Tokyo—an application rejected. Osawa going to Tokyo—never going near Shanghai—never heard of the Hua Hsin Company—save and except through the military authorities of Japan—a scheme to get their tanks to Tokyo—by Mexico, by Vladivostok—the name of Hua Hsin suggested by Ikuta—Osawa hounded day by day by the military authorities of Japan in Tokyo—an application signed by Leo Nye Sing, who never knew it contained 3 storage tanks, who had no connection with China Import & Export Company — $71,700 advanced by Mikuni-Shoko Company at Tokyo—none by Hua Hsin Company —the boat going to Yokohama before it goes to Shanghai."

Counsel quote us as admitting "that Kohno and Ikuta conspired to get their three 80,000 storage tanks to Japan, by means of a false application, but deny that they had any part in it" (Br. p. 20).

Counsel misread or misunderstood what we had said, namely:

> "Had the defendants in the Orient (Kohno and

> Ikuta) been on trial we would not contend that the case as to them should not have gone to the jury." (Br. p. 38)

We were contrasting the situation of appellants with that of the absent defendants, in the event of a trial together and a motion to take the case from the jury as to all defendants.

Appellants had recited how Mikuni-Shoko Co. had obtained Hua Hsin Co. to act in conjunction with appellants in the importation of wood oil from China, and how Mikuni-Shoko Co. in an attempt to back in again into the tank picture had inspired Hua Hsin to place an order with appellants for the three tanks. That Osawa had never been to Shanghai, had never met Hua Hsin Co., had had no communication with them, save through Mikuni-Shoko Co., yet an order, inspired by Mikuni-Shoko Co., had come through from Hua Hsin Co. to ship the tanks to them at Shanghai, which order resulted in the filing of the application complained about.

In view of this situation we suggested that while it was just to dismiss the case against appellants, the case as to the other defendants might be differentiated sufficiently to *carry the case to the jury.*

All this was apparently in answer to the query in our opening brief, "Where was any conspiracy? Who agreed with whom? Where was the meeting of minds? What was the end to be accomplished by two or more acting in concert?" And where we had further said, "The Government had no evidence of its own to offer. It was dependent upon such papers as it gained by the search and seizure and those subsequently fur-

nished them voluntarily by appellants, and such interpretation as it chose to put upon them, regardless of appellants' explanations."

But so far as we can see it still leaves the query unanswered. On its own showing the conspiracy had to date sometime after the business with Mikuni-Shoko Co. was closed in Tokyo and before November 2 following, when the search and seizure occurred.

But after closing all business with Mikuni-Shoko Company appellants never had any communication with them. They wrote appellants a couple of letters, to be sure. In these letters were some childish, gratuitous suggestions as to how to "get up evidence" and how to "get delivery of the tanks and prevent our business being detected," and more of like import. The letters were never answered. Takashashi was busy trying to sell the tanks here in this country.

So far as making an agreement is concerned the entire record undisputed shows Mikuni-Shoko Company tried to do so, and failed.

Finally, on this point, the charge of falsity in the application is that, instead of Tokyo, appellants named Shanghai as the place of ultimate destination.

Where is there any such evidence?

SEARCH AND SEIZURE

In our opening brief we suggested to the court that the justification for the search and seizure was to be predicated upon a state of crime being committed in the presence of the officers, and the law applicable

thereto. We had heard this argument advanced upon the hearing upon the petition for return of the papers, and repeated over and over again at the two trials, and our prophecy was based upon experience. So to invite a full discussion we suggested several points that we would maintain against any and all pleas of justification for the search and seizure, namely, (a) no arrest was made, (b) no search warrant was possessed by the officers, (c) no crime was being committed, (d) no proceedings against appellants were pending, (e) the papers seized had no connection with the purpose of the search, and (f) appellants were not even suspected of the crime or crimes with which they were later charged.

Respondent, however, does not join issue in this court. Instead, it starts with a proposition that the challenge to the search and seizure was untimely, in that it was delayed for four months after the search was made. This verges upon the pathetic. Any practitioner of today knows that any such challenge is timely, if only it precedes the date of trial, thus avoiding the court being called upon to try two issues at one and the same time.

Respondent then says, "Not only was there no request for the return of the papers, prior to the return of the indictment, but in fact we find a consent on the part of Takahashi, concurred in by his attorney, that the Government have not only the papers in question, but any other papers in his possession" (Brief, p. 19)

Counsel discriminates neither as to time nor papers.

The search and seizure complained of occurred on November 2, at the dock. On that date the Government, by exhibiting its badge of authority, forcibly searched the appellants, seized and walked off with appellants' papers. The damage had then been done, and was not condoned by appellants' subsequent actions in producing willingly any and all papers subsequently requested, and explaining any and all matters obscure to the Government agents. This becomes the more plain, as we reproduce the picture painted by respondent:

> "Mr. Atherton testified: 'We talked with defendant Takahashi and with Mr. Masuda, his counsel, at his place of business, practically every day. * * * During the month of November, we obtained other papers from him. I borrowed papers at frequent intervals. I would borrow some papers and he would give them to me, and I would take them to the office, examine them and bring them back, and he would give me some more. That occurred two or three times. Of some of the papers that I thought important, I had a photostat copy made."

And also quoting from the testimony of appellants' attorney, Mr. Masuda:

> "Mr. Takahashi called on me sometime about the 3rd of November, 1941, in connection with some request that had been made upon him by the Customs Department, or agents of the Customs Department of the United States. * * * He asked for advice about certain papers the agents wanted. He was willing to deliver the papers and I advised him to do so, and co-operate fully with the Government, and assist them in their investi-

gation. As far as I know, he made available to the agents everything that they wanted in the way of papers and documents."

The respondent contends that Osawa can not complain of the search and seizure because "all the documents referred to except Exhibit No. 9 were in possession of Takahashi," and that because Exhibit No. 9 belonged not to him but to Takahashi, Osawa cannot avail himself of the benefits of the Fourth Amendment.

But referring to the record, Atherton's affidavit (R. 61) and Richards' affidavit (R. 67), the officers took from Osawa not only Exhibit No. 9, but his brief case containing "other various papers" as well.

We emphasized Osawa and Exhibit No. 9 in our brief because the record as to the offer, the ruling thereon, and our exception, was most complete, and we deem it unnecessary now to go into a discussion of the "various other papers."

But even had Exhibit No. 9 been the only paper seized, and granting that it belonged to Takahashi and not Osawa, we doubt if the point is well taken. The violation of the Fourth Amendment is the matter urged—obtaining evidence in violation of his constitutional rights. Even if Exhibit No. 9 could at one time have been deemed "an instrument of crime," it lost that character when the crime was consummated, and ever after it was but "evidence." It is immaterial, then, who *owned* the evidence when the search and seizure occurred.

The only case which we have been able to find in which this matter is discussed is *United States v. Thomson, et al.*, 113 F.(2d) 643. In that case two

defendants were charged with and convicted of the crime of conspiring to use the mails to defraud. One of the defendants, Thomson, contended that the papers and documents seized from his office at the time of his arrest were wrongfully taken in violation of his constitutional rights, which contention was upheld by the Circuit Court. It thus became necessary to determine whether the judgment of conviction against Thomson's co-defendant should also be reversed. Concerning this the court said:

> "The papers seized in the instant case were in themselves not offending. They were taken for the sole purpose of getting evidence to convict the defendants of a crime with which they had been charged.
>
> *"It would be unjust and illogical to separate the two cases and uphold the judgment as to one defendant and reverse it as to the other. While the Constitutional amendments upon which the defense of illegal search and seizure is based may have been available to only one defendant, nevertheless the trial of the two together, and the introduction of evidence against them both may well have worked to the prejudice of the other."*

As the respondent has not chosen to discuss any of the questions proposed in our opening brief relating to the search and seizure, we find ourselves in the position of the Supreme Court of the United States, which lately said:

> "This record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest. No offender was in the garage, the action of the agents had no immediate

connection with an arrest. The purpose was to secure evidence to support some future arrest."

Taylor v. U. S., 286 U.S. 1, 52 S. Ct. 466, 76 L. ed. 951.

Again from that court:

"Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. * * * the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglar's tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime. *Boyd v. United States*, 116 U.S. 616, *et seq.*, 79 L. ed. 746, 6 S. Ct. 524; *Weeks v. United States*, 232 U.S. 383, 395, 58 L. ed. 652, 656, L.R.A. 1915B, 1177; *Gouled v. United States*, *supra* (255 U.S. 306, 65 L. ed. 651, 41 S. Ct. 261; *Carroll v. United States*, 267 U.S. 132, 69 L. ed. 543, 39 A.L.R. 790, 45 S. Ct. 280, *supra*."

United States v. Lefkowitz, 285 U.S. 452, 52 S. Ct. 420, 76 L. ed. 877, at p. 883.

Respondent cites *Marron v. U. S.*, 275 U.S. 192, but in so doing relates that the search of the premises mentioned was *incidental to a lawful arrest.* The Supreme Court itself also distinguishes the *Marron* case on the same ground.

U. S. v. Lefkowitz, 285 U.S. 452, 52 S. Ct. 420, 76 L. ed. 877.

Finally, respondent cites *Landau v. U. S.*, 82 F.(2d) 285, but only to the point that "a person entering the country from a foreign country can be searched."

UNFAIR COMMENT

After devoting eight pages of our opening brief to setting forth matter taken verbatim from the comments of the court while instructing the jury, which we deemed objectionable, and five pages more pointing out our objections and citing our authorities, the district attorney makes no reference thereto. He neither challenges the words attributed to the court, nor criticizes our authorities.

Instead, he meets the situation by contrast. After searching the record he sets forth two instances wherein he considers the court *was* fair! In this he was unjust to the court. There were really more.

GOOD REPUTATION

Anything we said upon this question in our opening brief, and the authorities cited therein, is not referred to by respondent.

Instead, the assignment is met by the proposition that no request was made for any instruction.

No authority is given and, obviously, counsel was relying upon his general knowledge of the law, overlooking that perhaps good reputation might require special treatment.

To begin with, no request is necessary when evi-

dence of good reputation is introduced. The court must instruct upon the point anyhow.

However, the court gave an instruction, without request, to which the appellants excepted, and it goes without saying that if he instructs at all he must do so correctly.

We respectfully submit that the judgments should be reversed as to both appellants and remanded with instructions to dismiss the action, or, in the alternative, to grant a new trial.

Respectfully submitted,

SAMUEL B. BASSETT,
Attorney for Appellant, Charles T. Takahashi,
811 Alaska Building, Seattle 4, Washington.

TRACY E. GRIFFIN,
Attorney for Appellant, Edward Y. Osawa,
1107 American Bldg., Seattle 4, Washington.